(2)

NO. 90-419

IN THE

Supreme Court of the United States

October Term, 1990

JOHN DOE,

Petitioner,

v.

BOROUGH OF CLIFTON HEIGHTS, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS BOROUGH OF CLIFTON HEIGHTS, POLICE CORPORAL ROBERT KEATES, POLICE OFFICER ZIMATH, and RICHARD ROE #1

JOHN M. CLEARY
515 E. Wynnewood Road
Merion, PA 19066
(215) 574-9799
Counsel for Respondents

October 3, 1990

THE COPY CENTER, INC. 615 Chestnut Street Philadelphia, PA 19106 215-928-1900

TABLE OF CONTENTS

STATEMENT OF THE CASE 1

REASONS WHY THE PETITION SHOULD BE DENIED. 9

A. Petitioner Never Alleged Or Proved Pennsylvania Or The Borough Of Clifton Heights Participates In Or Receives Funding Under The JJDPA 9

B. The Resolution Of Petitioner's Questions Are Irrelevant In This Case Since The Lower Courts' Rulings Rest On Firm Alternative Grounds 11

1. As to the Borough of Clifton Heights 11

2. As to Corporal Keates, Officer Zimath and Richard Roe #1 13

CONCLUSION 20

TABLE OF AUTHORITIES

Anela v. City of Wildwood
790 F.2d 1963 (3rd Cir.)
cert. denied 479 U.S. 949 (1986) . . . 16

Baker v. McCollan
443 U.S. 137 (1979) 17

City of Canton v. Harris
___ U.S. ___, 109 S.Ct. 1197,
103 L.Ed.2d 412 (1989) 11

Commonwealth v. Davenport
471 Pa. 278, 370 A.2d 301 (1977) . . . 15

Commonwealth v. Duncan
514 Pa. 395, 525 A.2d 1177 (1987). . . 15

Commonwealth v. Eaddy
472 Pa. 409, 372 A.2d 759 (1977) . . . 16

Commonwealth v. Morton
475 Pa. 374, 380 A.2d 769 (1977) . . . 16

Daniels v. Williams
474 U.S. 327 (1986) 18

Malley v. Briggs
475 U.S. 335 (1986) 17, 18, 19

Monell v. Department of Social Services
436 U.S. 658 (1978) 12-13

Juvenile Justice and Delinquency
Prevention Act, 42 U.S.C. §5633(a) . .9, 10

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Respondents Borough of Clifton Heights, Police Corporal Robert Keates, Police Officer Zimath, and Richard Roe #1 respectfully request that this Court DENY the Petition for a Writ of Certiorari, seeking review of the Third Circuit's decision in this case.

STATEMENT OF THE CASE

In the early morning hours of Saturday Nov. 14, 1987 Petitioner John Doe stole a car and then led units from two police departments on a high speed chase ending when Petitioner rammed his stolen car into a police cruiser. App.6-7. At approximately 2:45 a.m. Nov. 14 Petitioner was placed under arrest by defendants Corporal Robert Keates and Police Officer Zimath of the defendant Borough of Clifton Heights. App.6-7. Petitioner was charged with aggravated assault, simple assault, theft, and other offenses. App.10.

Petitioner was processed at the Clifton Heights Police Station. There Corporal Keates followed the normal procedure of asking the arrestee his name, date of birth, and if he had a driver's license so he could run this information through the po-

lice computer system to verify the identity of the arrestee. App.103.

Petitioner first told the officers he was 18 years old, but changed his story when he found out he was going to prison, at which time he said he was 17 years old. App.117. Petitioner gave Keates several different dates of birth over the course of an hour. App.101.

Petitioner insisted he had a valid Pennsylvania driver's license, but did not have it with him. App.94-95, 101. Keates ran Petitioner's name through the police computer which disclosed that a valid Pennsylvania driver's license had been issued in Petitioner's name and carried the date of birth of 12/27/60 and an address close to one given by Petitioner. App.98, 100, 106-107. In Keates' experience, people who falsify their address usually give an ad-

dress close to their actual address. App. 100. One of the dates of birth given by Petitioner was very close to 12/27/60. App.101. Because of these factors Keates was persuaded that Petitioner was the same person named in the driver's license and that he was an adult. App.101, 102, 106.

Keates attempted to verify this belief by calling the telephone number Petitioner gave him and by running his Social Security Number through the computer. Both efforts drew blanks. App.98-99; Supp.App.10, 11.

Petitioner's only identification on his person was a co-called "Pennsylvania Personal Identification Card." Keates had seen such purported "identification cards" many times in the course of his police duties. In his experience the information contained on these cards is false 90 percent of the time. App.8, 97. Even so, Keates attempted

to verify the information contained on the card. He called the telephone number on the card 5 to 10 times without receiving an answer. App.108.

Keates decided to reject the birth date listed on the card -- 4/5/70 -- because he distrusted such cards and could not verify any of the information on it. App.104. The card itself expressly warns that the "card issuer not responsible for ID card validity." App. 8.

At the time of arrest, Petitioner was over 6 feet tall and weighed more than 170 pounds. Based on his years of police experience Keates believed Petitioner looked like an adult. App. 110.

When Keates drafted the Affidavit of Probable Cause and the Ciminal Complaint against Petitioner he listed the caption as Petitioner "a/k/a John Doe." App.6-7, 10.

This type of caption is normal procedure when the arresting officer cannot positively substantiate the identity of the accused. App.112. The Affidavit of Probable Cause expressly and in detail explains the difficulty Keates had in attempting to verify Petitioner's identity and age. It concludes that Keates was unable to verify any of the information provided by Petitioner. App.7.

The Affidavit of Probable Cause and Criminal Complaint were presented to District Justice Perfetti at Petitioner's arraignment between 7 a.m. and 9 a.m. Saturday Nov. 14, 1987. Supp.App.22-25. That is, Petitioner was arraigned approximately six hours after arrest in accordance with the strict requirements of Pa.R.Crim.P. 130(a) and the Pennsylvania Supreme Court's Davenport/Duncan rule.

At his arraignment Petitioner told District Justice Perfetti he was only 17 years

old. Supp.App.18. District Justice Perfetti examined Petitioner's appearance and his "Pennsylvania Identification Card," the Affidavit of Probable Cause, and the Criminal Complaint. He concluded Petitioner was an adult and committed him to the defendant Delaware County Prison when he could not make bail. Supp.App.18.

Neither the Borough of Clifton Heights nor any of its officers had any part in deciding to commit Petitioner to the Delaware County Prison. District Justice Perfetti filled out and signed the Commitment Order. App. 113. Petitioner was subsequently transported to the Prison by county constables. Supp.App. 26.

Petitioner was allegedly assaulted in the Prison two nights later. Petitioner admits that no assaults or harm of any type occurred to him while he was in the custody of the Clifton Heights Police. Supp.App. 21.

It subsequently transpired that the birth date of 4/5/70 on Petitioner's "identification card" was accurate, making him 17 years, 7 months, and 9 days of age when he was arrested.

Keates has never had any difficulties in ascertaining an individual's age from his appearance. App.109. Except for this single incident, neither Keates nor Officer Zimath had ever arrested someone who was processed as an adult but was later determined to be a juvenile. Nor had either officer even been the subject of a complaint of any kind concerning his performance as a police officer. Supp.App. 7, 12.

Except for this single incident, the Borough of Clifton Heights never processed an individual as an adult who was later discovered to be a juvenile. Nor had such a mis-identified person ever been incarcerated in the Delaware County Prison after

arrest by the Borough's police. Supp.App. 4, 11.

REASONS WHY THE PETITION SHOULD BE DENIED

A. PETITIONER NEVER ALLEGED OR PROVED PENNSYLVANIA OR THE BOROUGH OF CLIFTON HEIGHTS PARTICIPATES IN OR RECEIVES FUNDING UNDER THE JJDPA.

The predicate for Petitioner's civil rights action under 42 U.S.C. §1983, is Respondents' alleged violation of the Juvenile Justice and Delinquency Prevention Act, 42 U.S.C. §5633(a)(12), (13) & (14) ("JJDPA"). The JJDPA is a federal-state grant program whereby the federal government provides financial assistanct to participating states to aid them in creating programs to improve their juvenile justice systems. Participation in the JJDPA is voluntary and states are given the choice of complying with the conditions set forth in the Act or forgoing

the benefits of federal funding. See §5633.

However, Petitioner's Complaint did not allege that Pennsylvania or the Borough of Clifton Heights participate in the JJDPA program or receive funding from that program. App.37-49. After thorough discovery Petitioner failed to produce any evidence whatsoever that Pennsylvania or the Borough participate in or receive funding under the JJDPA.

Without such participation or funding, the Borough and its officers do not fall within the strictures of the JJDPA. It would be absurd to hold Respondents liable for violations of the JJDPA when there is no evidence they participate in it.

Due to this fundamental flaw in Petitioner's pleading and proof, this case is not an appropriate vehicle to determine the questions presented by Petitioner. Accordingly, the Petition should be denied.

B. THE RESOLUTION OF PETITIONER'S QUESTIONS ARE IRRELEVANT IN THIS CASE SINCE THE LOWER COURTS' RULING RESTS ON FIRM ALTERNATIVE GROUNDS.

1. As to the Borough of Clifton Heights

The district court ruled against Petitioner and in favor of the Borough on all of Petitioner's claims. The basis for this ruling was Petitioner's total failure to present any evidence of a municipal policy or custom violating the JJDPA. As the court stated:

> As the Supreme Court recently stated, "our first inquiry in any case alleging municipal liability under section 1983 is the question of whether there is a direct causal link between a municipal policy or custom, and the alleged constitutional deprivation." City of Canton v. Harris, slip op. at 7 [109 S.Ct. 1197, 103 L. Ed.2d 412, 424 (1989)]. Here, the record contains no evidence of any municipal policy or custom, formal or informal, of incarcerating juveniles with adult offenders. The experience of John Doe appears to have been an isolated incident. As a result, this Court must grant summary judgment in favor of the municipal defendants on all of plaintiff's claims. [A-4]

Petitioner does not now challenge the validity or correctness of this ruling. Although Petitioner raised this issue before the Court of Appeals, he abandoned it in his Petition for Rehearing and continues to abandon it in the present Petition.

Any answer by this Court to the two questions presented by Petitioner would not implicate or affect in any manner the actual basis for the lower courts' ruling: Petitioner's failure to prove municipal policy or custom. Regardless of whether or not the JJDPA applies to the Borough, Petitioner does not challenge the ruling that the Borough does not violate the JJDPA by policy or custom.

The only time the Borough can be liable under §1983

> is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury

that the government as an entity is responsible under §1983.

Monell v. Department of Social Services, 436 U.S. 658, 694 (1978).

Consequently, if Petitioner fails to prove the existence of such a policy or custom, his suit must fail as a matter of law.

Petitioner's question regarding qualified immunity also is irrelevant to the Borough because it is not liable under $1983 for any form of vicarious liability including the doctrine of respondeat superior. Monell, 436 U.S. at 691.

2. As to Corporal Keates, Officer Zimath and Richard Roe #1

Petitioner's questions are irrelevant to Corporal Keates, Officer Zimath and Richard Roe #1 because no matter how the JJDPA is interpreted, they did not violate it. That is, they did not incarcerate

Petitioner in an adult facility: District Justice Perfetti and defendant Delaware County Prison did.

Keates and Zimath made District Justice Perfetti fully aware of their uncertainty as to Petitioner's identity and age. After questioning Petitioner, District Justice Perfetti concluded he was an adult and committed him to Delaware County Prison. He was transported by Delaware County constables to the Delaware County Prison where he was locked up with adults and allegedly assaulted. Petitioner admits he was not harmed or assaulted in any way while he was in the custody of the Borough or its officers.

As such, neither the Borough nor any of its officers are responsible for committing Petitioner to an adult jail.

Thus, no matter how this Court answers the questions presented by Petitioner, the

lower courts' rulings will remain unaffected because they rest on a different and still viable ground.

Furthermore, it is clear Corporal Keates and Officer Zimath were, at worst, merely mistaken in their judgment as to Petitioner's age. It is also clear that such an error of judgment or mere negligence is not sufficient to destroy their qualified immunity and subject them to §1983 liability.

The Borough's officers had between 2:45 a.m. and 9 a.m. on a Saturday to complete their investigation and present Petitioner for a prompt arraignment as required by Pa.R.Crim.P. 130(a). The Pennsylvania Supreme Court has mandated arraignment within six hours of arrest. Commonwealth v. Davenport, 471 Pa. 278, 286, 370 A.2d 301, 306 (1977), Commonwealth v. Duncan, 514 Pa. 395, 525 A.2d 1177, 1182-1183 (1987). The arraignment cannot be delayed past this six

hour period even if a continued investigation by the police would exculpate the accused. Commonwealth v. Eaddy, 472 Pa. 409, 372 A.2d 759, 761 (1977); Commonwealth v. Morton, 475 Pa. 374, 380 A.2d 769, 773 (1977).

Failure to comply with these state rules of criminal procedure and to delay Petitioner's arraignment would have given rise to a valid §1983 action against the Borough and its officers. See, Anela v. City of Wildwood, 790 F.2d 1063 (3d Cir.), cert. denied 479 U.S. 949 (1986).

In the limited time available to them, Corporal Keates and Officer Zimath tried every avenue of ascertaining Petitioner's identity and age. See, pages 2-8, supra. After this investigation they concluded Petitioner was an adult.

Keates and Zimath may be denied qualified immunity from §1983 liability only if

a reasonably well-trained police officer in their position would have concluded Petitioner was a minor, or if no reasonably competent officer would have concluded he was an adult. Malley v. Briggs, 475 U.S. 335, 345, 341 (1986). (*)

Contrary to Petitioner's interpretation of Malley, this objective standard "gives ample room for mistaken judgments." Malley, 475 U.S. at 343. See also, Baker v. McCollan, 443 U.S. 137, 146 (1979)("Nor is the official charged with maintaining custody of the accused ... required by the Court to perform an error-free investigation").

Based on the information at hand and their experience, Corporal Keates and Officer Zimath concluded Petitioner was an

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* This objective standard permits the resolution of insubstantial claims such as Petitioner's on summary judgment. Malley v. Briggs, 475 U.S. at 341.

adult. Although erroneous, this conclusion was not so objectively unreasonable as to deny qualified immunity to Corporal Keates and Officer Zimath. That is, because officers of reasonable competence could disagree as to whether Keates and Zimath should have known Petitioner was a minor, a qualified immunity should be recognized. Malley v. Briggs, 475 U.S. at 341.

In essence, Petitioner seeks to do an end run around the district court's finding that Corporal Keates and Officer Zimath were, at worst, merely negligent in their investigation of Petitioner's age. See district court opinion at pages A-6 & A-7 of the Petition.

As the district court correctly ruled, an individual's mere negligence or lack of due care will not suffice to impose §1983 liability upon him. Daniels v. Williams, 474 U.S. 327, 328, 331-333 (1986).

Thus, Keates' and Zimath's subjective understanding of the rights allegedly created by the JJDPA is irrelevant because when their actual conduct is judged by Malley's objective standard, they are still entitled to a qualified immunity.

Petitioner's question concerning qualified immunity seeks to determine §1983 liability based on the subjective knowledge of Keates and Zimath. However, Malley requires an objective appraisal of the officers' conduct. The district court performed such an appraisal and concluded they were merely negligent and mistaken in their judgment. Such a finding does not suffice to destroy the qualified immunity to which Corporal Keates and Officer Zimath are entitled by Malley and this Court's past decisions.

This case does not present an instance of deviation from this Court's precedent or

that of the Third Circuit. On the contrary, it presents an instance of the district court correctly applying precedent to a straight forward fact pattern and ruling in favor of Respondents.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JOHN M. CLEARY
515 E. Wynnewood Road
Merion, PA 19066
(215) 574-9799
Counsel for Respondents

October 3, 1990